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**OPINION OF THE PUBLIC ACCESS COUNSELOR**

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STEVEN C. NESTER,  
*Complainant,*

v.

TOWN OF FOUNTAIN CITY,  
*Respondent.*

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Formal Complaint No.  
18-FC-112

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Luke H. Britt  
Public Access Counselor

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BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging that the Town of Fountain City (“Town”) violated the Access to Public Records Act.<sup>1</sup> Clerk-Treasurer Trina D. McGuire filed an answer to the complaint on behalf of the Town. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by

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<sup>1</sup> Ind. Code §§ 5-14-3-1 to -10

the Office of the Public Access Counselor on August 10, 2018.

## **BACKGROUND**

This case involves a summertime dispute over copy fees for public records. Steven C. Nester (“Nester”) claims the Town of Fountain City (“Town”) violated the Access to Public Records Act (“APRA”) by charging him \$0.50 per page for copies of public records that he requested from Clerk-Treasurer Trina McQuire (“Clerk”). Nester also contends that the Clerk stated that he would be required to provide payment for the copies in advance.

Nester asserts that he challenged the Clerk about the copy fee by directing her to Indiana Code section 5-14-3-8 to no avail. Notably, the Town argues that Nester was not charged the copy fee on the day in question, but instead the Clerk informed him that he would be charged the fee going forward. As a result, Nester filed a formal complaint with this Office based on the Town’s copy fee and advance payment policies

The Town disputes Nester’s claim that the copy fee violates APRA. The Clerk contends that the Town has an ordinance that requires any person requesting a copy of a public record to pay in advance the “actual cost of copying the record,” which the Town determined to be fifty cents (\$0.50) per page for standard size copies.

Although the Clerk acknowledges that the Town enacted the ordinance in question “many years ago,” she argues that the charge is both reasonable and permissible under APRA. Moreover, the Clerk noted that she presented her findings

on this issue to the Town council and “there were no disagreements in [her] findings.” She also stated that the Town Attorney indicated that Nester should be paying what the ordinance requires.

### ANALYSIS

The principle issue in this case is whether the Town of Fountain City’s ordinance that requires a person to pay fifty cents (\$0.50) per page for standard size copies of public records complies with the Access to Public Records Act.

#### 1. The Access to Public Records Act (“APRA”)

The Access to Public Records Act (“APRA”) states that “(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” Ind. Code § 5-14-3-1.

The Town of Fountain City is a public agency for purposes of APRA; and therefore, is subject to the Act’s requirements. *See* Ind. Code § 5-14-3-2(q). Thus, unless an exception applies, any person has the right to inspect and copy the Town’s public records during regular business hours. Ind. Code § 5-14-3-3(a).

APRA contains exceptions—both mandatory and discretionary—to the general rule of disclosure. In particular, APRA prohibits a public agency from disclosing certain records unless access is specifically required by state or federal statute or is ordered by a court under the rules of discovery. *See* Ind. Code § 5-14-3-4(a). In addition, APRA lists other types of public records that may be excepted from disclosure

at the discretion of the public agency. *See* Ind. Code § 5-14-3-4(b).

## 2. Copy Fees

Nester and the Clerk disagree about whether the Town's fifty cent (\$0.50) per page fee for copies of public records is permissible under APRA.

APRA does authorize public agencies to charge a fee for providing copies of public records. Indiana Code Section 5-14-3-8(d) provides:

This subsection applies to a public agency that is not a state agency. The fiscal body (as defined in IC 36-1-2-6) of the public agency, or the governing body, if there is no fiscal body, shall establish a fee schedule for the certification or copying of documents. The fee for certification of documents may not exceed five dollars (\$5) per document. The fee for copying documents *may not exceed* the greater of:

- (1) ten cents (\$0.10) per page for copies that are not color copies or twenty-five cents (\$0.25) per page for color copies; or
- (2) the actual cost to the agency of copying the document.

(emphasis added). APRA expressly states that a fee for copying documents may not exceed the greater of ten cents per page or the *actual cost* to the agency of copying the document.

Here, the Town is charging fifty cents per page for copies. As set forth *supra*, our legislature capped copy fees to no

more than the greater of ten cents per page or the actual cost to the agency. Undoubtedly, the Town's copy fee is exceeding a dime per page, but that's only permissible if the fee amount equals the *actual cost* to the agency.

APRA defines *actual cost* for these purposes to mean:

*the cost of paper and the per-page cost for use of copying or facsimile equipment and does not include labor costs or overhead costs. A fee established under this subsection must be uniform throughout the public agency and uniform to all purchasers.*

Ind. Code § 5-14-3-8(d)(emphasis added). The Clerk does not argue or otherwise suggest that the actual cost to Town of Fountain City for providing standard copies of public records is indeed fifty cents (\$0.50) per page. Instead, the Clerk simply argues that the Town's copy fee is "reasonable and permissible."

This Office cannot agree.

The fee is not permissible because there is no evidence to support that the Town's cost of paper and the per-page cost for use of equipment is fifty cents per page. The plain language of the statute expressly states that a "fee for copying documents *may not exceed* the greater of" ten cents per page or the agency's actual cost. The Town failed to argue—much less support—the notion that its *actual cost* is fifty cents per page for copies.

What is more, the fee is not reasonable because a requestor is being charged at least five times as much as they rightfully should be under the law for copies of public records.

In the experience of this Office, such a charge is never justified nor reasonable.

### **3. Payment-in-Advance**

Nester also argues that payment in advance violates the Access to Public Records Act. This is not so. It is perfectly acceptable for an agency to recoup known costs in advance— insofar as those costs are reasonable – in order to ensure a requestor does not fail to pick up the responsive records.

## CONCLUSION

Based on the foregoing, it is the opinion of the Public Access Counselor that the ordinance in the Town of Fountain City that levies a fifty cent (\$0.50) per page charge for copies of public records is contrary to, and violates the Access to Public Records Act.

This Office has been in touch with the Clerk-Treasurer and the Town attorney who have pledged to address the issue. It is my hopeful expectation that the matter has been remedied or will be in the near future. I have been advised the fee schedule was addressed at the October 3, 2018 Board meeting and therefore the ordinance should be amended as soon as possible.



Luke H. Britt  
Public Access Counselor